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AT AUSTIN

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COURT OF CRIMINAL APPEALS
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NO. PD-0245-20
(COA# 07-18-00028-CR)

JEREMY DAVID SPIELBAUER,
Appellant
V.
THE STATE OF TEXAS,
Appellee

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE SEVENTH COURT OF APPEALS AT AMARILLO

ON APPEAL FROM THE 251ST DISTRICT COURT
RANDALL COUNTY, TEXAS

BRIEF OF THE STATE OF TEXAS

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CERTIFICATE OF INTERESTED PERSONS

I hereby certify that the following individuals have an interest in this case. I make these representations in order that the members of this Court may evaluate possible disqualifications or recusal.

Trial Judge:	Honorable Ana Estevez
Attorney for the State:	James Farren and Justin Rippey
Appellant:	Jeremy David Spielbauer
Trial Counsel:	Joe Marr Wilson
Appellate Counsel:	Hillary Netardus
State's Appellate Counsel:	Warren L. Clark

s/ Warren L. Clark
Warren L. Clark

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THE COURT OF APPEALS ERRED IN HOLDING THAT A WRITTEN RESPONSE IN A JUROR QUESTIONNAIRE, STANDING ALONE, ESTABLISHES A PROPER CHALLENGE FOR CAUSE, EVEN IF BASED UPON AN ERRONEOUS STATUTORY GROUND FOR CAUSE.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 20, 2016, Appellant was indicted for the felony offense of Capital Murder. The indictment alleged that Appellant shot Robin Spielbauer with a firearm while in the course of committing or attempting to commit robbery. (C.R. 5) From January 15 through 25, 2018, a jury considered the collective testimony of 49 witnesses and reviewed 287 exhibits in the form of photographs, DVD recordings, charts, cell phone location records, expert reports, bank records and physical evidence (firearm, spent aummunition, shell casings). In the end, it found Appellant guilty of the lesser included offense of murder and assessed his punishment at life imprisonment and a fine of $10,000. (C.R. 127-28) The trial court formally sentenced Appellant in open court on January 25, 2018. (R.R. 10:59) Appellant filed his motion for new trial on January 26, 2018 which was overruled by operation of law. (C.R. 124-26) Appellant timely perfected his appeal to the

Seventh Court of Appeals.

On January 22, 2020, the appeals court reversed Appellant's conviction in a published opinion. The State filed its motion for rehearing on February 4, 2020. It was denied without opinion on February 21, 2020. The State filed its Petition For Discretionary Review on March 19, 2020 which this Court granted on June 17, 2020.

STATEMENT OF FACTS

Prior to the beginning of the voir dire examination of the petit panel, juror questionnaires were completed by panel members. After having each venireperson complete a short biographical section requesting age, marital status, children, education and occupation, they were asked to answer a section titled "AWARENESS OF CASE." A short summary of the case was provided which alluded to the date of the offense and a short statement that the victim, "Robin Spielbauer, 32, was shot to death by her ex-husband, Jeremy Spielbauer" and that the victim "was found the next day lying next to her SUV on the west side of Helium Road . . ." The venireperson was asked to fill out their "yes" or "no" response to the first question inquiring whether he or she had heard about the case. Next, the venireperson was asked to give a summary of what details he or she had heard and what that source might have been, be it radio, television report, Internet, social media or word of mouth. The third question, loosely utilizing language derived from TEX. CODE

CRIM. PROC. Art. 35.10(a)(10), inquired whether knowledge of the case so acquired had caused the venireperson to form an "opinion as to the guilt or innocence of [Appellant] as would influence you in finding a verdict?" (R.R. 11: Defendant's Voir Dire Exhibits 1 & 2)

Upon completion and distribution of the questionnaires, the parties appeared before the trial court to commence the general voir dire examination of the venire panel. At this juncture, Appellant's counsel informed the trial court that those prospective jurors (and in particular venireperson Freethy) who had indicated in their questionnaires that their "opinion would influence them in finding a verdict" should be "automatically disqualified" for cause. Counsel challenged the need for any questioning whatsoever of these particular venirepersons, arguing that their written, affirmative answers to the "awareness of case" inquiry obviated any live questioning and that their dismissal was mandated by the statute.. (R.R. 3:5,6-7)

The prosecutor wasn't committed to this proposition, pointing out that the "written answers are so brief, that if we visited with them, that they might explain 'Well, that is not what I am trying to say.'" (R.R. 3:5) He noted that the inquiry did not elicit from a potential venireperson any firm conclusion or decision that the accused was guilty as the result of having heard or read anything about the case or, for that matter, before having heard any evidence. Finally, he alerted to obvious

contradictory answers apparent on the face of Freethy's questionnaire and observed that his affirmative, written answer could simply be a mistake or that his affirmative response could have been marked accidentally. (R.R. 3:7-8). In other words, how else could the parties and the Court know the prospective juror's true feelings, opinions or conclusions on the matter until he was asked to explain all of the answers to his questionnaire.

Given the contradictory questionnaire responses, the trial judge indicated its desire to question not only Freethy but an additional panel member based on her specific answers to the same series of questions (Juror 30 Perry). (R.R. 3:9) While the State eventually agreed to the dismissal of Perry, the trial court's questioning of Freethy confirmed his having heard about the case but that he "[didn't] remember too much." Further, when asked if he intended to answer "yes" to the "awareness of the case" question, Freethy acknowledged that he was not sure why he answered the question the way he did. (R.R. 3:13) He stated that he did not know anything about the case and denied that he was already inclined to a finding of guilt or innocence of Appellant. (R.R. 3:13-14) Freethy's equivocal responses to some of counsels' questions about why he answered the "awareness" question in the affirmative invited the trial court's inquiry of "whether or not you know anything about it [the Spielbauer case] . . . have you formed an opinion on whether or not Mr.

Spielbauer was guilty?" Freethy denied having formed an opinion as to Appellant's guilt, ascribing mistake to his affirmative, written answer. (R.R. 3:14-15) Appellant's counsel was invited to continue his interrogation of Freethy. He merely confirmed that the venireman had made a mistake in answering the question. Counsel made no attempt to delve into Freethy's thought processes behind the written, affirmative response. He did not challenge Freethy's truthfulness. (R.R. 3:15, lines 14-19)

A similar process was repeated with venireperson Havlik (Juror 128). He explained that his affirmative answer to the third part of the "awareness" question was the result of having read the question wrong and that he did not have an opinion as to Appellant's guilt or innocence. (R.R. 3:17) In the end, four other venirepersons confirmed their unqualified, affirmative answers to the subject "awareness" question and were discharged by way of agreed challenges for cause based on their responses to the "awareness" question. (see R.R. 3:19 (Adams), 3:20-21 (Brinson), 3:22-23 (King), 3:122 (Ebers)).

Appellant grounded his challenges for cause against Freethy and Havlik solely on the proposition that the jury questionnaire was a formal part of the voir dire stage of the trial. He contended that the law provided for *nothing less* than automatic disqualification without live questioning, regardless of the prospective juror's stated

denials or vacillating answers. (R.R. 3:5,6,16,18) Following the examination of these six venirepersons, the panel was summoned and the jury selection process commenced. The State and Appellant were afforded unfettered opportunity to question all prospective jurors on their opinions of the applicable law, knowledge of the case and whether such opinions or knowledge might impair their ability to discharge their duty to serve as jurors at Appellant's trial. Appellant's counsel made no further attempt to examine either Freethy or Havlik as to their opinions on knowledge of the case or whether any conclusions reached by either would have influenced their respective verdict on the issue of guilt or innocence. At the conclusion of voir dire, Appellant's counsel requested that the court reconsider its earlier ruling on both venirerpersons Freethy and Havlik and failing that, grant Appellant two additional peremptory strikes. The trial court denied both requests. (R.R. 3:258-59)

The appeals court held that Freethy's and Havlik's written answers to the "awareness" question automatically disqualified each as a potential juror and that the trial court committed reversible error by denying Appellant's challenges to both. Further, the appeals court held that the trial court abused its discretion and committed reversible error by questioning both venirepersons in an effort to resolve the contradictory, conflicting or ambiguous answers in Freethy's and Havlik's juror

questionnaires. The opinion is grievously misguided because it reverses on the basis of a rule which diametrically conflicts with established Court of Criminal Appeals precedent. Likewise,it fails to conform its own jury-rigged rule to the strict requirements of the statute at play, co-opts the traditional role occupied by the trial court when resolving juror conflicts or ambiguities and unreasonably limits the discretion of the trial court in the discharge of its historical duty to resolve those conflicts and ambiguities among prospective jurors.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Point of Error

Can written responses in a juror questionnaire, standing alone, establish a proper challenge for cause when based on an inaccurately worded statutory ground for cause?

ARGUMENT

I.

Law applicable

A.

The law on voir dire and making a challenge under art. 35.16(a)(10)

> A challenge for cause is an objection made to a particular juror, alleging some fact which renders the juror incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:

. . . . .

> That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence the juror in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in the juror's opinion, the conclusion so established will influence the juror's verdict. If the juror answers in the affirmative, the juror shall be discharged without further interrogation by either party or the court. If the juror answers in the negative, the juror shall be further examined as to how the juror's conclusion was formed, and the extent to which it will affect the juror's action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that the juror feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that the juror is impartial and will render such verdict, may, in its discretion, admit the juror as competent to serve in such case. If the court, in its discretion, is not satisfied that the juror is impartial, the juror shall be discharged.
>
> TEX. CODE CRIM. PROC. art. 35.16(a)(10)

A defendant may properly challenge any prospective juror who has a bias or prejudice against the defendant or any phase of the law upon which he is entitled to rely. Art. 35.16(a)(9), (a)(10), (c)(2). When reviewing a trial court's decision to grant or deny a challenge for cause, the appeals court looks at the entire record to determine if there is sufficient evidence to support the trial court's ruling. *Feldman*

v. State, 71 S.W.3d 738, 743-45 (Tex.Crim.App. 2002); *Patrick v. State*, 906 S.W.2d 481, 488 (Tex.Crim.App. 1995).

The test is whether the bias or prejudice would substantially impair the prospective juror's ability to carry out his oath and instructions in accordance with the law. *Feldman*, 71 S.W.3d at 743-45. Before a prospective juror may be excused for cause on this basis, the law must be explained to him and he must be asked whether he can follow that law regardless of his personal views. *Id*. Finally, the proponent of the challenge for cause has the burden of establishing that his challenge is proper. *Id*. The proponent does not meet his burden until he has shown that the veniremember understood the requirements of the law and could not overcome his or her prejudice or bias well enough to follow it. *Id*.

When the record reflects that a veniremember vacillated or equivocated on his or her ability to follow the law, the reviewing court *must* defer to the trial court. *Moore v. State*, 999 S.W.2d 385, 400 (Tex.Crim.App. 1999); *Brown v. State*, 913 S.W.2d 577, 580 (Tex.Crim.App. 1996). In the context of a 35.16(a)(10) challenge for cause, the proponent must establish that the veniremember's *conclusion* as to the defendant's guilt or innocence as would indeed influence him or her in "[the] action in finding a verdict." *Cannady v. State*, 11 S.W.3d 205, 209 (Tex.Crim.App. 2000); *Curry v. State*, 910 S.W.2d 490, 493 (Tex.Crim.App. 1995).

B.

Judicial discretion and its ruling on challenges for cause

A reviewing court will reverse a trial court's ruling on a challenge for cause only if a clear abuse of discretion is evident. *Colburn v. State*, 966 S.W.2d 511, 517 (Tex.Crim.App. 1998). When a prospective juror's answers are unclear, contradictory or vacillating, the reviewing court must accord deference to the trial court's decision. *Id.* Further, when reviewing a trial court's decision to deny a challenge for cause, the reviewing courts must "look at the entire record to determine if there is sufficient evidence to support its ruling." *Davis v. State*, 329 S.W.3d 798, 807 (Tex.Crim.App. 2010); *Feldman v. State*, 71 S.W.3d at 743-45.

A finding of whether a juror is absolutely disqualified is a "question of fact to be resolved by the trial court in the first instance." *Gardner*, 306 S.W.3d 274, 300-01 (Tex.Crim.App. 2009); *also see Hammond v. State*, 799 S.W.2d 741, 744-45 (Tex.Crim.App. 1990). If the evidence is conflicting or contradictory, "the trial court has discretion to find, or for that matter, refuse to find facts such as would justify a challenge for cause." *Gardner* at 300-301. Hence, a reviewing court will not second guess the trial court from the cold record when a prospective juror's answers are vacillating, contradictory, unclear or ambiguous. *Rachal v. State*, 917 S.W.2d 799, 810 (Tex.Crim.App. 1996).

A trial court is not beholden to a particular response in a written questionnaire to the exclusion of other information before it. This stands to reason because the trial judge is in the best position to evaluate a venireperson's demeanor and responses. This is what entitles the trial judge to that "considerable deference" this Court has consistently recognized and honored over the years. *See Colburn*, 966 S.W.2d at 517 and its progeny. This longstanding standard of review presumes interaction with veniremembers in a live voir dire setting because the trial court is not permitted to rely solely upon information provided within the questionnaire when being called upon to resolve juror conflicts or contradictions given in written explanation. Minimum interaction on the part of the veniremember during voir dire is required. *Cardenas v. State*, 325 S.W.3d 179, 185-86 (Tex.Crim.App. 2010); *Garza v. State*, 7 S.W.3d 164, 166 (Tex.Crim.App. 1999); *Cade v. State, No. AP-76,883 * 70 (Tex.Crim.App. Jan. 27, 2016) (do not publish).*

C.

The law on juror questionnaires

Written questionnaires do not constitute a formal part of voir dire. *Garza v. State*, 7 S.W.3d at 166. After the questionnaire or, as the case may be, the juror information card is answered, the trial court, prosecutor and defense attorney are then permitted to explain the requirements of the law applicable to the case to the

venire panel during voir dire. *Cardenas v. State*, 325 S.W.3d at 185-86; *Garza v. State*, 7 S.W.3d at 166; *also see Barnard v. State*, 730 S.W.2d 703, 715 (Tex.Crim.App. 1987). It follows that a veniremember cannot be sufficiently questioned regarding possible prejudice, bias or potential disqualification revealed in a questionnaire or during voir dire without, at the very least, some amount of interaction on the part of the veniremember during voir dire. *Id*.

Counsel – both the prosecutor and defense counsel – must be diligent in eliciting pertinent information from prospective jurors during voir dire in order to uncover potential prejudice or bias. *Jones v. State*, 596 S.W.2d 134, 137 (Tex.Crim.App. 1980), *overruled on other grounds*, *Sneed v. State*, 670 S.W.2d 262, 266 (Tex.Crim.App. 1984). This diligence is no less in the case of written questionnaires. The Court of Criminal Appeals has observed that extra care should be paid to the questionnaire and the information provided within.

> Particularly because of the nature of written questions, counsel should be sure to ask follow-up oral questions concerning any of the information on the form that counsel deems material. While a questionnaire may serve as an efficient vehicle for collecting demographic data, it is not the most reliable way to collect other types of information. Counsel should never assume that the respondents will understand each question as it was intended by counsel to be understood. . . . [W]ritten questions are by nature vulnerable to misinterpretation – even questions that appear to be subject to only one interpretation.

Gonzalez v. State, 3 S.W.3d 915, 917
(Tex.Crim.App. 1999)

D.

The interplay between voir dire and the questionnaire's accuracy

As to the issue of the inclusion of an art. 35.16(a)(10) inquiry to a jury questionnaire, that decision is left to the sound discretion of the court. *Curry v. State*, 910 S.W.2d at 492. However, that discretion is contingent upon a 35.16(a)(10) inquiry which accurately tracks the language of the statute. It must inquire of the venireperson whether he or she has established in their mind from "hearsay or otherwise" a "*conclusion* as to the guilt or innocence of the defendant as would influence him in his [or her] action in finding a verdict." *Id*. (emphasis added)

Article 35.16(a)(10) does not absolutely disqualify a veniremember who has an *opinion* regarding a defendant's guilt or innocence. Rather, to invoke the statute, the movant must demonstrate that it is the venireperson's *conclusion* as a defendant's guilt or innocence which would then *indeed* influence their verdict. *Curry*, 910 S.W.2d at 493; *Rodriguez v. State*, No. AP-74,399, 2006 WL 827833, * 7 (Tex.Crim.App. March 29, 2006) (do not publish). And it is no exercise in hair-splitting nor a matter of mere semantics to distinguish one's *opinion* from that of one's *conclusion*. Handy reference to leading authorities on the clear meaning of

both terms provides stark differences.[1]

The difference between the two concepts informs this Court's previous determination that a trial court could *not* have abused its discretion by refusing to instruct potential jurors that their "opinions" as to the accused's guilt would serve as disqualification under art. 35.16(a)(10). In so holding, the Court noted the "significant difference" as to that required by statute: whether or not the venireperson's *conclusion* might tend to influence their verdict. Furthermore, the additional inquiry requested by the defendant inquiring "whether the opinion or belief would influence their verdict" was "just as significantly different from the question that the statute require[d]." The moral is clear: fidelity to the exact language drafted, enacted and embedded into the text of art. 35.16(a)(10) by the Legislature is required before any legitimate consideration of disqualification can be entertained pursuant to that statute. *Rodriguez v. State, supra* * 7.

The accurate assessment of that degree of a venireperson's certainty on the issue of having reached a firm conclusion on a defendant's guilt or innocence and its attendant "influence on the verdict" is attained solely through a live examination of the venireperson. Moreover, *only* through this interaction with the venireperson

1 A "conclusion" is a "result," "outcome," a "final settlement" or "final decision." *Random House Webster's Dictionary*, 4th Ed. (2011). It can be an "opinion reached by reasoning." *Oxford English Dictionary*, Oxford University Press, 2008. Now compare that with an "opinion" which is a "belief that rests on grounds insufficient to produce certainty," "a personal view," "attitude" (*Random House*) or a "personal view not necessarily based on fact or knowledge." (*Oxford*).

can the trial judge make an informed ruling on a challenge for cause predicated on an affirmative answer to an art. 35.16(a)(10) inquiry. *Newbury*, 135 S.W.3d 22, 29-30 (Tex.Crim.App. 2004); *Cardenas*, 325 S.W.3d at 185-86; *also see Cade v. State*, * 69-71 (trial court correctly overruled defendant's challenge for cause lodged against four veniremembers based solely on their answers to the written questionnaire after court permitted the parties to question the potential jurors regarding the law and possible prejudice, thus satisfying the maxim which compels interaction with the veniremember during voir dire.)

E.

Art. 35.16(a)(10) and judicial discretion

The manner in which the voir dire examination is conducted is left to the sound discretion of the trial court. Reviewing courts extend considerable deference to the trial court's decisions which resolve conflicts, ambiguities or vacillation among potential jurors. These "johnny-on-the-spot" judgment calls merit this considerable deference because the trial judge occupies a unique perspective on matters of demeanor, non-verbal cues and juror candor. And while a reviewing court accords substantial deference to the trial court's decisions, the nature of an art. 35.16(a)(10) inquiry does seem to temper that discretion to a degree. This most likely explains why the *Rodriguez* Court insisted on the necessity that an art.

35.16(a)(10) inquiry track the exact language of the statute, given the draconian remedy of discharge "without further interrogation" once a prospective juror's conclusion "as would influence the verdict" has been demonstrated. *Rodriguez, supra* at * 5-7. This holding handily complimented this Court's previous observations on the workings of the statute in two published cases. *See Curry v. State*, 910 S.W.2d at 493 and *Newbury*, 135 S.W.3d at 22-28.

In *Curry*, this Court examined the live interplay between the Court, the parties and the venireperson as it pertained to "conclusions on a defendant's guilt or innocence [which] would indeed affect his decision during deliberation." Though terse, *Curry* addressed a number of questions raised in the current dispute. There was no question that this Court applied a strict reading of the statute to the issue drawn on appeal. Potential jurors were to be examined on the strength of their "conclusions on the defendant's guilt or innocence," as opposed to holding a similar "opinion." *Curry*, 910 S.W.2d at 493. The Court saw fit to convey a heightened standard of certainty ("indeed") when considering the effect of having reached this "conclusion." *Id*.

Whatever the nomenclature, the *Curry* Court examined the entire record. It had no need to consider the effect of a written, affirmative answer to the art. 35.16(a)(10) inquiry since that event merely triggered the need to conduct the subject

voir dire live examination in the first place. This fact-intensive review examined a finding of "unequivocal influence," or not as the case may be, and asked whether reasonable minds could dispute the decision made on the spot. *Curry* at 492. All questions about credibility and resolution of disputed facts were left to the trial judge's discretion and judgment. Those decisions ruled the day. *Id*. In conclusion, *Curry* reaffirmed the vitality of an established procedure for juror disqualification challenges, including one based on art. 35.16(a)(10). It requires the trial court to resolve disputes and assess credibility through the mechanism of live interplay with the prospective juror. Only after consideration of the entire record before it – the entirety of the actual juror questionnaire, oral responses to questions posed to the prospective juror by the judge and attorneys, his demeanor and delivery – may the trial court resolve the challenge at hand. *Id*.

Nevertheless, *Curry* did not dispel some lingering notions that an affirmative written response to an art. 35.16(a)(10) inquiry automatically disqualified the prospective juror from service, thereby precluding any interaction whatsoever. The issue was resolved once and for all in *Newbury*. There, the defendant's argument mirrored Appellant's contention in this present controversy – potential jurors who indicate in a jury questionnaire an opinion or conclusion as to a defendant's guilt or innocence should be excused without further questioning by the court or the parties.

Rejecting this argument, this Court held that art. 35.16(a)(10), in conjunction with art. 35.17, § 2 "literally permits" that information about the law and its prohibitions be provided to a venireperson. Further, the Court held that indeed a trial court and the parties are *required* to propound questions "concerning the principles, as applicable to the case on trial" of, among other things, "opinions." *Newbury*, 135 S.W.3d at 30 (citing to *Freeman v. State*, 556 S.W.2d 287, 292-93 (Tex.Crim.App. 1977), *cert. denied* 434 U.S. 1088, 98 S.Ct. 1284, 55 L.Ed.2d 794 (1978)). Finally, as to the idea that a singular, affirmative response to the art. 35.16(a)(10) inquiry shut down all interplay, this Court's observation is worth repeating verbatim:

> We further note that in 1965 the Legislature added the "without further interrogation by either party" language to Article 35.16(a)(10). *See* Acts 1965, 59th Leg., ch. 722, § 1, effective January 1, 1966. According to Former Presiding Judge Onion's Special Commentary, this language was added (not out of a concern that permitting rehabilitation would affect "the determination of whether impartial jurors are impaneled") but because the practice under prior law resulted "in attempts of counsel and the court to qualify a prospective juror who had made such statement which consumed a great deal of time with little success." This language was not meant to prohibit a party from accurately explaining the law to the veniremembers.
>
> *Newbury*, *supra* at 30.

II.

Application of law to the facts of this appeal

The appeals court's opinion is fundamentally flawed on four counts which, individually or in concert, are fatal to its validity. They are as follows.

A.

A written answer to a questionnaire cannot trigger the draconian results of absolute disqualification under art. 35.16(a)(10) because questionnaires are merely tools to facilitate jury selection

Appellant based his challenges to Freethy and Havlik solely on their written responses to the art. 35.16(a)(10) inquiry. He considered the jury questionnaires as part and parcel of the voir dire phase of his trial. (R.R. 3:5,6-7) Notably, he did not rely on any response either made as the result of live interrogation. But written questionnaires do not constitute a formal part of the voir dire process, contrary to his stated objection. *Garza*, 7 S.W.3d at 166. Appellant's failure to flesh out any possible bias, prejudice or pre-determination of guilt on the part of either venireperson was testament to his lack of diligence. *Gonzalez*, 3 S.W.3d at 917. Thus, his challenges were not properly developed, were predicated on a repudiated, unfounded principle of law and therefore fails as a matter of law. *Newbury*, 135 S.W.3d at 29-30; *Feldman*, 71 S.W.3d at 743-45; *Rodriguez*, supra * 7; *Cade, supra*

* 69-71.[2]

B.

Even if, by a stretch, the jury questionnaire could conceivably be considered part of formal voir dire, it failed to adhere strictly to the language of the statute which the Legislature has deemed dispositive

A cardinal rule of statutory construction is that a reviewing court will construe a statute in accordance with the plain meaning of its text unless the text is ambiguous or that a plain reading would lead to an absurd result that the Legislature could not possibly have intended. *Griffith v. State*, 166 S.W.3d 261, 262 (Tex.Crim.App. 2005) (citing to *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App. 1991). Art. 35.16(a)(10) establishes a discrete test which sets the baseline for a proper challenge. The proponent must prove that the juror has, from hearsay or otherwise, established in his or her mind such a conclusion as will influence the juror's verdict. The source of extrajudicial information is from "hearsay or otherwise," not a vague suggestion of "having heard about the case." The statute mandates that the juror must have

2 This is not to suggest that a written answer to a jury questionnaire could never form the basis for disqualification of a potential juror. Research has revealed authority holding that the court's excusal of a prospective juror was adjudged proper when based on that juror's answers to a jury questionnaire which leave no doubt that his or her views the law would prevent or substantially impair the performance of his or her duties in accordance with the trial court's instructions and the juror's oath. *see People v. Avila*, 133 P.3d 1078, 1105, 43 Cal. Rept.3d 1, 35 (Cal. 2006), *cert. denied*, 549 U.S. 1306 (2007). In *Avila*, the answers provided by the excused potential jurors were "*sufficiently unambiguous* to allow the courts to identify disqualifying biases on the basis of their written responses alone." *Id*. (emphasis added) The key to *Avila* of course was the fact that the answers under consideration left *no doubt* as to the existence of the venireperson's bias, prejudice or factual predisposition. Here, we have the mirror image with Freethy and Havlik having presented a buffet of conflicting, contradictory responses which begged clarification.

established in their mind a firm *conclusion*, not some "opinion as to the guilt or innocence" of the accused "as would influence in finding a verdict." Having an "opinion" and harboring a "conclusion" are distinct concepts and attempts to analyze the two as the same serve up a false equivalency.[3]

Just as the *Rodriguez* Court found the inaccurate reference of "opinions" and their propensity to affect or influence a juror's verdict to be of "significant difference" from that required by adherence to the exact language of the statute, the appeals court's opinion suffers from the same deficiency. *Rodriguez, supra* * 7. Appellant's challenge, structured on an incomplete and inaccurately worded art. 35.16(a)(10) inquiry, was fundamentally flawed under the reasoning of precedent from this Court. It could not have formed the basis of a valid challenge for cause and thus, the trial court was well within its discretion when it denied such challenge.

3 This mistake in thinking is most prevalent in the appeals court's opinion under its "Applicable Law" discussion. There, its author conflates the terms "conclusion," as used in establishing a challenge under art. 35.16(a)(10), with "whether a venire member has formed an *opinion* that would *influence* his or her verdict" which would "[mandate] that the venire member be discharged without further interrogation by either party or the court." (emphasis added to "opinion"). This is not a correct recitation of the test. Reviewing courts are constrained by statutory language present in the clear text and are not free to substitute cherry-picked terms, regardless of their synonymous character. *Accord Moreno v. State*, __ S.W.3d __ (Tex.Crim.App. No. PD-1044-19, delivered June 17, 2020) (citing to *Boykin v. State*, 818 S.W.2d at 785 and reaffirming that reviewing courts are not at liberty to rely upon judicial authority or other sources of support that go beyond the clear statutory language and that the appeals court's failure to adhere to a plain reading of the text and unambiguous precedent was reversible error).

C.

Assuming the jury questionnaire embraced the spirit of the statute, the veniremen's contradictory answers required that the trial court resolve the issues, not an appellate court

The appeals court's opinion seems to attach a patina of "objectivity" to the art. 35.16(a)(10) inquiry in the questionnaire, suggesting that the question was not subject to misinterpretation, confusion or mistake. (slip opinion at 12-13) It does not cite any case law in support of this proposition; nor does it acknowledge the wealth of authority which holds to the contrary. This explains that court's neglect to address the contradictory answers each prospective juror provided in their respective questionnaires.[4] It also might explain why the reviewing court, if indeed it applied the correct standard of review, did not explain the processes it utilized in finding that the trial court abused its discretion when it determined that both venirepersons were credible and that their answers were probably the result of a mistake.

4 Not to belabor the point but the State provided the appeals court in its 26-page motion for rehearing a menu of those conflicting or contradictory answers to explain why the trial court was *required* to summon Freethy and Havlik and review those answers with them. For example, in contrast to Freethy's affirmative answer to the "awareness" inquiry, he also agreed that criminal defendants should be presumed innocent, that a verdict be based on evidence heard in a courtroom (and not from what one hears, sees or experiences outside the courtroom) and strongly disagreed that an accused is "probably guilty" just because they were charged with a crime. Likewise, Havlik contradicted his affirmative response to the art. 35.16(a)(10) inquiry by, among other answers given, agreeing that all people are to be presumed innocent until the State proves up the case beyond a reasonable doubt and that the verdict of a criminal case should be based only on evidence heard in a courtroom and not from what one may hear or see or experiences. Most striking is the fact that both veniremen agreed that neither could think of a *single* reason why each could *not* be considered to be "absolutely fair" to the accused. The trial court reasonably considered these answers to be conflicting, contradictory or ambiguous, a judgment call supported by this record.

These fact determinations were judgment calls made by the trial court after it had conducted its own examination of each prospective juror, taking full advantage of its superior position to assess demeanor, body language and credibility. It chose to believe that mistake lay behind the art. 35.16(a)(10) response. Through proper application of the abuse of discretion standard of review, it does not lie within the appeals court's prerogative to disturb this finding and substitute its own peculiar judgment in place of the trial court's carefully wrought credibility determinations under the facts of this record. Those issue resolutions rule the day. *Moore v. State*, 999 S.W.2d at 400; *Colburn v. State*, 966 S.W.2d at 517; *Rachal v. State*, 917 S.W.2d at 810; *Brown v. State*, 913 S.W.2d at 580. At the very least, the trial judge is entitled to that level of deference this Court extended those trial judges in *Newbury*, *Cade* and *Rodriguez* under identical facts.

D.

The level of discretion afforded the trial court necessarily includes the ability to question jurors

The appeals court's opinion faults the trial court for conducting live examination of the two prospective jurors. This holding is misguided and in conflict with a considerable body of law holding distinctly to the contrary. Just as the reviewing court will look to the entire record when determining if there is sufficient evidence to support the trial court's ruling, it is incumbent that the trial

court conduct the voir dire examination in a manner to ensure that there is an adequate record for this appellate review.

No one disputes what constitutes all those elements which make up the factual basis for a valid challenge for cause. However, in order to make the proper ruling, it is the trial court's responsibility to ensure that each prospective juror has had the law adequately explained to him or her and has been asked if they can follow that law regardless of personal views or opinions. *Feldman*, 71 S.W.3d at 743-45; *Patrick*, 906 S.W.2d at 488. Only after these tasks have been completed can the trial court consider the challenge on the merits. This is why the disqualification of a prospective juror is an intrinsic question of fact to be resolved by the trial court in the first instance. *Gardner*, 306 S.W.3d at 300-01; *Hammond*, 799 S.W.2d at 744-45. Events of juror confusion over written questions drafted by lawyers is inevitable. Conflicting or ambiguous answers are reasonably foreseeable. Since the trial court is not permitted to rely solely on mere written answers when ruling on a challenger for cause, minimum interaction with the veniremember is required. That is the order of the day. *Cardenas v. State*, 325 S.W.3d at 185-86; *Garza*, 7 S.W.3d at 166.

Here, the contradictions and ambiguities present in Freethy's and Havlik's questionnaires *compelled* the live examination conducted by the trial court. Only

through this interaction with the veniremembers could the trial court make any semblance of an informed ruling on Appellant's challenges for cause predicated solely on the written affirmative answer to the art. 35.16(a)(10) inquiry. *Newbury*, 135 S.W.3d at 28-29. Finally, as to the persistent mantra pertaining to that part of the statute which calls for an immediate cessation to "further interrogation by either party" once an affirmative response has been made, interpretation of this text has never been construed to limit the trial court's duty to explain the law to a prospective juror *or* its ability to engage in this live interaction *or* in permitting the parties to explore these concepts and ideas with the venire panel. *Id*.

The appeals court's opinion -- holding that this degree of interplay between the trial court and veniremembers Freethy and Havlik was prohibited and constitutes an abuse of discretion -- is manifestly incorrect because it has no support at law. The trial court employed proper procedure to arrive at ultimate credibility determinations, validated by the record. They simply are not susceptible to the reviewing court's substitution of its collective judgment.

III.

Conclusions

The State submits that the appeals court's conclusion that Appellant's challenges for cause to Freethy and Havlik were proper has no support at law and is

in fatal conflict with prevailing law. The appeals court's opinion is further undermined because the questionnaire, even if considered to be a formal part of *voir dire*, did not contain accurate statutory instructions. Appellant could never have formed a proper challenge based solely on the written (inaccurate) question and (dubious) response. So, the trial court could not have abused its discretion by denying that challenge. Finally, the trial court's exercise of discretion in its resolution of juror confusion, fact disputes or juror credibility is entitled to substantial deference. The trial court was well within its discretion when it denied Appellant's challenges. Examination of the totality of the record does not support the appeals court's conclusion that the trial court abused its discretion by interrogating Freethy and Havlik rather than rely on a dubious jury questionnaire alone. The intermediate court's substitution of its fact determinations in place of the trial court's own on the strength of this record is grievously misplaced and impermissibly encroaches on the traditional, time-honored level of deference accorded the district court. This all was in error.

PRAYER

WHEREFORE, the State of Texas respectfully prays that this Honorable Court find that the appeals court erred in holding that the trial court abused its discretion in overruling Appellant's challenges to venirepersons Freethy and Havlik,

reverse the judgment of that court and remand the cause so that Appellant's remaining issue on appeal with the Seventh Court of Appeals be resolved.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that a true and correct wordcount to this State's Brief on the Merits is 6,510 words and was prepared with Microsoft Word software in 14 point Times New Roman font and 12 point font for footnotes.

s/ Warren L. Clark
Warren L. Clark

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing State's Brief on the Merits from the State's Petition for Discretionary Review was provided to Hillary Netardus, counsel for Appellant JEREMY DAVID SPIELBAUER, and the Office of the Special Prosecuting Attorney on this the 8th day of July, 2020.

s/ Warren L. Clark
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